No. 10686

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
v. *Appellant*
ABERDEEN AERIE No. 24 of the FRATERNAL ORDER OF EAGLES, a corporation,
and *Appellee*
UNITED STATES OF AMERICA,
v. *Appellant*
BALLARD AERIE No. 172 of the FRATERNAL ORDER OF EAGLES, a corporation, *Appellee*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. CHARLES H. LEAVY, *Judge*

BRIEF FOR THE UNITED STATES

J. CHARLES DENNIS,
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OPINION BELOW

The opinion of the District Court (R. 73-85) is not reported.[1]

[1] This opinion has reference to the two cases here involved and that of *Seattle Aerie No. 1 of the Fraternal Order of Eagles v. Clark Squire, Collector of Internal Revenue of the United States* in which latter case no appeal has been taken. It has been stipulated that the cases here involved be consolidated for purposes of appeal. (R. 114.)

JURISDICTION

The appeal in the Aberdeen Aerie case involves an action under Section 3772 of the Internal Revenue Code for the recovery of social security taxes paid subsequent to April 1, 1938 (R. 87), with respect to 1938 through September 30, 1941, under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code. Within four years of such payment, as provided by Section 3313 of the Internal Revenue Code, on January 23, 1942 (R. 87-88), claims for refund of a portion of the taxes so paid were filed with the Collector of Internal Revenue. On October 1, 1942, these claims for refund were disallowed in full by the Commissioner of Internal Revenue. (R. 91.) Within two years of such disallowance, as provided by Section 3772 (a) (2) of the Internal Revenue Code, this action was commenced on November 5, 1942. (R. 21-40.) Jurisdiction of this action was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. Judgment of the District Court was entered on September 14, 1943 (R. 102-103), and notice of appeal was filed on December 10, 1943 (R. 108). Jurisdiction of this Court is invoked by virtue of Section 128 (a) of the Judicial Code, as amended.

The appeal in the Ballard Aerie case involves an

action under Section 3772 of the Internal Revenue Code for the recovery of social security taxes paid on March 4, 1941 (R. 95), with respect to 1936 through 1939 under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. Within four years of such payment, as provided by Section 3313 of the Internal Revenue Code, on July 16, 1941 (R. 95), claims for refund of the taxes so paid were filed with the Collector of Internal Revenue. On September 6, 1941, the claims for refund with respect to 1936, 1938, and 1939 were disallowed in full by the Commissioner of Internal Revenue. (R. 95-96.) On March 25, 1942, the claim for refund with respect to 1937 was disallowed in full by the Commissioner of Internal Revenue. (R. 96.) Within two years of such disallowance, as provided by Section 3772 (a) (2) of the Internal Revenue Code, this action was commenced on November 4, 1942. (R. 2-21.) Jurisdiction of this action was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. Judgment of the District Court was entered on September 14, 1943 (R. 100-101), and notice of appeal was filed on December 10, 1943 (R. 109-110). Jurisdiction of this Court is invoked by virtue of Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

Aberdeen Aerie Case

Whether the physician, president, vice-president, treasurer, and trustees, of the Aberdeen Aerie were in the employment of that organization under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

Ballard Aerie Case

Whether the physicians and treasurer of the Ballard Aerie and a musician performing services for it were in the employment of that organization under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp.

STATEMENT

Aberdeen Aerie Case

This is an action commenced by the Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, hereinafter sometimes referred to as taxpayer, for the recovery of taxes paid under Title VIII of the Social Security Act and of Chapter 9A of the Internal Revenue

Code. Taxpayer is a fraternal organization created under the laws of the State of Washington relative to such organizations. (R. 87.)

Taxpayer filed original and supplementary quarterly returns under Title VIII of the Social Security Act and under Chapter 9A of the Internal Revenue Code and paid taxes thereon as follows (R. 87):

	1938	$53.08
	1939	59.02
	1940	57.84
January 1,	1941 to	
September 30,	1941	47.51

On January 23, 1942, taxpayer filed separate claims for refund of these taxes for the years and in the amounts as follows (R. 87-88):

	1938	$19.24
	1939	22.81
	1940	19.20
January 1,	1941 to	
September 30,	1941	8.86

These claims for refund were based generally on taxpayer's contention that its Aerie physician and certain of its officers were not in its employment for purposes of this tax. (R. 65-68.)

On October 1, 1942, taxpayer's four claims for refund were disallowed. (R. 91.) The present action was commenced on November 5, 1942. (R. 40.)

Ballard Aerie Case

This is an action commenced by the Ballard Aerie No. 172 of the Fraternal Order of Eagles, hereinafter sometimes referred to as taxpayer, for the recovery of taxes paid under Title IX of the Social Security Act and of Chapter 9C of the Internal Revenue Code. Taxpayer is a fraternal organization created under the laws of the State of Washington relative to such organizations. (R. 95.)

On January 17, 1941, taxpayer filed its annual returns under Title IX of the Social Security Act and under Chapter 9C of the Internal Revenue Code for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows (R. 95):

1936	$ 18.68
1937	98.44
1938	393.82
1939	310.79

On July 16, 1941, taxpayer filed separate claims for refund of the amounts of tax above indicated, on the ground that during these years it was not an employer of eight or more individuals; that its Aerie physicians, certain of its officers, and a musician were not in its employment; that, consequently, it was not subject to this tax. (R. 95.)

The claims for refund with respect to 1936, 1938,

and 1939 were denied on September 6, 1941. The claim for refund with respect to 1937 was denied on March 25, 1942. (R. 95-96.)

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to taxpayer $232.92 with respect to its taxes for 1938, and $157.70 with respect to its taxes for 1939. The result of these refunds was to reduce the net amount of taxes paid by taxpayer for 1938 to $160.90 and that paid for 1939 to $153.09. (R. 96.) The present action for the recovery of the remainder of the refunds claimed by taxpayer was commenced on November 4, 1942. (R. 21.)

STATEMENT OF POINTS TO BE URGED

Aberdeen Aerie Case

1. Taxpayer's physician, president, vice president, treasurer, and trustees were in its employment for purposes of Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code.

2. These individuals were not excluded from the employment of taxpayer on the ground that they were officers whose duties and activities were exclusively ritualistic.

3. The physician was not excluded from the

employment of taxpayer on the ground that he was an independent contractor.

Ballard Aerie Case

1. Taxpayer's physicians and treasurer and a musician performing services for it were in its employment for purposes of Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code.

2. These individuals were not excluded from the employment of taxpayer on the ground that they were officers whose duties and activities were exclusively ritualistic.

3. The physicians were not excluded from the employment of taxpayer on the ground that they were independent contractors.

SUMMARY OF ARGUMENT

The exemption from social security tax extended to non-profit organizations by the Social Security Act Amendments of 1939, effective January 1, 1940, has no application to these cases.

The term "employment" does not include services which are exclusively ritualistic. In determining whether services are exclusively ritualistic, administrative services are to be ignored but only if: (1) They

are connected with ritualistic services; (2) they are subordinate to ritualistic service; and (3) they are uncompensated.

Services rendered by the president, vice-president, treasurer, trustees, and musician for the taxpayers are not within the definition of exclusively ritualistic service so as to be excluded from the term employment. The services so rendered by the musician were performed by him as an employee rather than an independent contractor. The provisions exempting casual labor from the social security tax have no application to this musician.

Services performed for the taxpayers and their members by the Aerie physicians were rendered by them as employees and not as independent contractors.

ARGUMENT

I

A STATEMENT OF THE INDIVIDUALS WHOSE STATUS IS INVOLVED IN THESE CASES

Aberdeen Aerie Case

This action involved liability for tax on employers and employees imposed under Title VIII of the Social Security Act and Chapter 9A of the Internal Revenue Code. Difficulty is experienced in determining from

the record in this case the individuals whose status is properly in issue and the periods involved in such issue.

The claims for refund for 1938 and 1939 (R. 88-89) refer to one physician, "trustees and ritualistic officers," without naming the particular offices. However, the proper names of certain individuals are stated and from the offices held by these, the offices intended to be placed in issue have been determined. In this manner it has been ascertained that the claims for refund for 1938 and 1939 refer to a conductor. No mention of this office is made in the complaint.

The complaint in this action does not coincide with the claims for refund on which it is based. For all four periods the complaint refers to two physicians. (R. 23, 28, 32, 36.) Only one physician is mentioned in the claims for refund. For all four periods the complaint refers to a musician. (R. 25, 29, 33, 37.) No musician is mentioned in the claims for refund. For 1940 and January 1, through September 30, 1941, the complaint refers to various officers and committee members. (R. 25, 29, 33, 37.) The claims for refund for these periods mention only one physician and no other officer or committee member.

The Government advances no contention that ser-

vices performed by the members of the audit committee are to be included in the term "employment" as defined in Sections 811 (b) of the Social Security Act and 1426 of the Internal Revenue Code. However, the record in this case contains no evidence that a tax was paid with respect to remuneration paid to these individuals. Consequently, no adjustment of the taxpayer's liability is warranted on this point.

An action for the recovery of a refund of tax may not be based on any ground not set forth in the claim for refund on which the action is founded. *United States v. Felt & Tarrant Co.*, 283 U. S. 269. Consequently, the status of any officer referred to in the complaint and not referred to in the claims for refund is not properly in issue in this action. The converse is likewise true. The status of any officer referred to in the claims for refund and not referred to in the complaint is not properly in issue in this action.

The discrepancy which exists between the claims for refund and the complaint in this action is indicated by the chart set forth in Appendix B, *infra*. Taking into account the concession with respect to the members of the audit committee and applying the foregoing principles to the indicated discrepancy, the following officers are found to be properly in issue in this case for the periods named:

Physician	1938 through Sept. 30, 1941
President	1938 through 1939
Vice President	1938
Treasurer	1938 through 1939
Trustees	1938 through 1939

Ballard Aerie Case

This action involves liability for tax on employers of eight or more employees under Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. The individuals whose status is in issue in this case, the years involved in such issue, and the individuals whose service is conceded to be within the term "employment" as defined in Section 907 (c) of Title IX of the Social Security Act and Section 1607 (c) of the Internal Revenue Code (Appendix, *infra*) have been stipulated. (R. 104-106.) This stipulation may be summarized as follows:

In issue	1936	1937	1938	1939
Physician	2	3	2	2
Treasurer	1		1	1
Musician	1	1	1	1
Total	4	4	4	4
Not in issue	5	5	5	5
Total	9	9	9	9

Unless it is determined that in a particular year at least three of the above named individuals in issue

are in the employment of the taxpayer, so as to bring its total employees to eight or more, no liability for tax exists under Title IX of the Social Security Act or Chapter 9C of the Internal Revenue Code with respect to that year.

II

THE TAXPAYERS ARE NOT EXEMPT FROM SOCIAL SECURITY TAX BY VIRTUE OF THEIR BEING FRATERNAL ORGANIZATIONS

While it is stated by the District Court that its decision is based solely on considerations pertinent to the status of the various individuals involved, through repeated reference to the fraternal and non-profit character of the taxpayers it is apparent that the court found some justification for its decision in these latter considerations.

Section 101 (3) of the Revenue Acts of 1936, 1938, and the Internal Revenue Code exempts from income tax fraternal organizations. Section 101 (6) of the Revenue Acts of 1936, 1938, and the Internal Revenue Code exempts from income tax charitable organizations.

Using language identical with that of Section 101 (6), services performed in the employ of a char-

itable organization have always been excluded from the term "employment" by Section 811 (b) (8) of Title VIII of the Social Security Act, now Section 1426 (b) (8) of the Internal Revenue Code, and Section 907 (c) (7) of Title IX of the Social Security Act, now Section 1607 (c) (8) of the Internal Revenue Code. Prior to January 1, 1940, this was the only exemption from social security tax extended to organizations referred to in Section 101. Effective on January 1, 1940, Sections 606 and 614 of the Social Security Act Amendments of 1939 added further provisions to the law, namely Section 1426 (b) (10) (A) (Appendix, *infra*) and Section 1607 (c) (10) (A) of the Internal Revenue Code (excluding from the term "employment" services performed for any organization exempt from income tax by Section 101 of the Internal Revenue Code, under certain conditions. Since fraternal organizations are exempt from income tax under Section 101 (3) of the Internal Revenue Code, such organizations are affected by these latter amendments if the prescribed conditions for exemption are met. However, as stated, these amendments are only effective on and after January 1, 1940.

The District Court cites and quotes from *Hassett v. Associated Hospital Service Corp.*, 125 F. (2d) 611 (C.C.A. 1st), to the effect that merely because a non-

profit organization is, for the first time, specifically made exempt from social security tax under the Social Security Act Amendments of 1939, this does not warrant the inference that prior to such amendments the organization was taxable. This is the theory announced by the dissenting judge in that case and the quotation used by the District Court is from the dissenting opinion in that case. It is held by the majority in the *Hassett* case that the exemption extended to charitable organizations under the Social Security Act prior to January 1, 1940, is not broad enough to include a non-profit hospital service corporation, despite the fact that such latter corporation is exempt under the amendments to this law effective on January 1, 1940. A similar result was reached in *Chester C. Fosgate Co. v. United States*, 125 F. (2d) 775 (C.C.A. 5th), certiorari denied, 317 U.S. 639, holding that the Social Security Act Amendments of 1939 have only prospective effect from January 1, 1940.

The only individual involved in these cases for any period subsequent to January 1, 1940, is the physician in the Aberdeen Aerie case whose status for 1938 through September 30, 1941, is in issue. Of the conditions prescribed for the exemption of non-profit organizations under the Social Security Act subsequent to January 1, 1940, the only provision of possible ap-

plication here is Section 1426 (b) (10) (A) (i) of the Internal Reveue Code to the effect that service of any individual for a non-profit organization is to be excluded from the term employment if the remuneration paid does not exceed $45 in any calendar quarter. The record in this case contains no assertion or evidence that the remuneration paid to the physician was $45 or less in any calendar quarter. Taxpayer bears the burden of proving that it comes within one of these exemption provisions. *Wells Fargo Bank & Union Trust Co. v. McLaughlin,* 78 F. (2d) 934 (C.C.A. 9th), certiorari denied, 296 U.S. 638. That burden has not been met in this case. Consequently, it follows that the exemption provisions made applicable to non-profit organizations after January 1, 1940, by the Social Security Act Amendments of 1939 have no application here.

III

SERVICES WHICH ARE EXCLUSIVELY RITUALISTIC ARE EXCLUDED FROM THE TERM "EMPLOYMENT"

The tax on income of individuals imposed by Section 801 of Title VIII of the Social Security Act and Section 1400 of the Internal Revenue Code (Appendix, *infra*) is measured by a percentage of the "wages"

received with respect to "employment". The excise tax on employers imposed by Section 804 of Title VIII of the Social Security Act and Section 1410 of the Internal Revenue Code and the excise tax on employers imposed by Section 901 of Title IX of the Social Security Act and Section 1600 of the Internal Revenue Code (Appendix, *infra*) are levied with respect to having individuals in their employ and measured by a percentage of the "wages" paid with respect to "employment". The definition of wages contained in Section 811 (a) of Title VIII and Section 907 (b) of Title IX of the Social Security Act and Sections 1426 (a) and 1607 (b) of the Internal Revenue Code is the same, namely, all remuneration for "employment."

From the foregoing it is apparent that the common key word in the application of these taxing statutes is the term "employment". With stated exceptions, this is defined in Section 811 (b) of Title VIII and Section 907 (c) of Title IX of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code as any "service" of whatever nature performed by an "employee" for his employer. From this it follows that the basis of liability for tax under the Social Security Act, with certain additional requirements, is "service" by an "employee".

The distinction between exclusively ritualistic

service and service of an ordinary type was recognized by Congress in the amendment of Sections 1426 (b) and 1607) (c) of the Internal Revenue Code by the Social Security Act Amendments of 1939, excluding from the term "employment" ritualistic service in connection with any "fraternal beneficiary, society, order, or association". By Sections 606 and 614 of the Social Security Act Amendments of 1939, these amendments are effective on January 1, 1940. They do not have retroactive effect. *Chester C. Fosgate Co. v. United States, supra.*. Except for the physician whose services are clearly not ritualistic, no officer is involved in these cases for any period after January 1, 1940. Consequently these statutory amendments with respect to ritualistic service have no application here.

Prior to January 1, 1940, the distinction between ritualistic service and service of an ordinary type was recognized by the Commissioner of Internal Revenue in Mim. 4880, 1939-1 Cum. Bull. 312. It was held that (p. 313):

> * * * ritualistic services, as such, do not constitute "service" within the meaning of that term as used in Sections 811 (b) and 907 (c) of the Act and accordingly that those officers whose duties and activities are exclusively ritualistic, are not, in the performance of such duties and activities, to be considered as being in an "employment" for

> purposes of Titles VIII and IX of the Act. In determining whether or not these services are exclusively ritualistic within the meaning and intent of the foregoing rule, incidental, *non-compensated* administrative services may be ignored.

While the ruling does not define strictly ritualistic activities, by reference solely to officers, it recognizes as ritualistic activities only those performed by officers. Attention is called to the fact that the incidental administrative services which may be ignored must be incidental to strictly ritualistic activities as distinguished from those incidental to the fraternal office generally of the individual concerned. The term "incidental" may be defined as — in connection with and subordinated to.[2]

To summarize, under Mim. 4880 exclusively ritualistic services do not constitute service within the meaning of the term "employment" for purposes of Titles VIII and IX of the Social Security Act. In determining whether services are ritualistic it is necessary that they be performed by a fraternal officer. In determining whether services are exclusively ritualistic, administrative services may be ignored, but

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[2] *Builders' Club of Chicago v. United States*, 58 F. (2d) 503 (C.Cls.) *The Robbin Goodfellow*, 20 F. (2d) 924, 925 (W.D. Wash.); "Incident", Bouvier's Law Dictionary (3d Rev.), Vol. 2, p. 1527.

only if (1) they are connected with ritualistic services; (2) they are subordinate to ritualistic services; and (3) they are uncompensated.

The exemption extended by Mim. 4880 results from an administrative construction placed upon this law by the Commissioner of Internal Revenue who is charged with the administration of the taxing sections of the Social Security Act. There is no express statutory provision applicable to these cases which would justify the exemption here sought. No grounds exist for giving this ruling a more liberal application than was intended by the Commissioner. If the individuals here involved do not come within the literal meaning of Mim. 4880 their services are not to be excluded from the term "employment" for purposes of the Social Security Act.

IV

SERVICES PERFORMED BY THE PRESIDENT, VICE PRESIDENT, TREASURER, TRUSTEES, AND MUSICIAN ARE NOT EXCLUSIVELY RITUALISTIC SO AS TO BE EXCLUDED FROM THE TERM "EMPLOYMENT"

There is little in the record of these cases to indicate the nature and extent of the strictly ritualistic duties and activities of the taxpayers' president, vice

president, treasurer, and trustees. This is unquestionably due to the inherently secret character of these ritualistic matters. Despite this deficiency in the record, it is assumed that these officers had duties and performed activities which are strictly ritualistic. However, in addition, these officers performed administrative services. It becomes necessary to determine whether these administrative services can be ignored as being (1) connected with ritualistic services; (2) subordinate to ritualistic services; and (3) uncompensated.

For this purpose, reference is made to the "Constitution for Subordinate Aeries, Fraternal Order of Eagles, as amended and adopted by the Forty-third Grand Aerie Convention, held in Milwaukee, Wisconsin, August 14-18, 1941." This appears in pamphlet form as the taxpayers' Exhibit 6 in the original record in these cases which has been certified to this Court. It is assumed that the provisions of this constitution were the same throughout the period here involved.

The constitution requires the president to notify the grand secretary of the name and address of any Aerie secretary elected other than at an annual election (Art. 9, Sec. 4, p. 16); to notify the chief auditor if the secretary fails to deliver any Aerie funds to the

treasurer (Art 9, Sec. 5, p. 17); to notify the grand secretary and the chief auditor if the treasurer fails to comply with the laws of the lodge (Art. 9, Sec. 6, p. 17); to inspect all ballots and report to the lodge (Art. 9, Sec. 7, p. 17); to sign all warrant checks (Art. 9, Sec. 8, p. 17); to sign all cards, certificates, and other documents requiring his signature for authentication (Art. 9, Sec. 9, p. 17); to consider and, if satisfactory, to sign the semi-annual reports to the grand secretary (Art. 9, Sec. 10, p. 17); to cause the trustees to remit at least semi-monthly to the secretary the money received by the lodge (Art. 19, Sec. 13, p. 17); to appoint all committees and to act as ex officio member of each (Art. 9, Sec. 14, p. 18); to assist the auditing committee and to report to the grand secretary in the event their duties are not performed (Art. 9, Sec. 15, p. 18; Art. 20, Sec. 7, pp. 38-39); and to provide temporary financial aid to any member suddenly stricken with sickness or injury and to report such matter to the lodge (Art. 9, Sec. 16, p. 18). The constitution provides that the president shall receive compensation of $1 per quarter. (Art. 9, Sec. 19, p. 18.)

It is the duty of the vice president to assist the president and to perform all of his duties in the event of the president's incapacitation. He is required to

inspect all ballots. The constitution provides that the vice president shall receive compensation of $1 per quarter. (Art. 10, p. 19.)

The constitution requires the treasurer to demand and receive from the secretary all funds of the Aerie, to give a receipt therefor, and to deposit them in the bank within 48 hours (Art. 13, Sec. 1, p. 23, Sec. 8, p. 25); to sign all warrant checks (Art. 13, Sec. 2, p. 23); to report at each meeting the financial position of the lodge (Art. 13, Section 3, p. 24); to have his books of account in readiness for auditing at the close of each month and to attend the meetings of the auditing committee when requested (Art. 13, Sec. 4, p. 24); to file a written report with the lodge at the end of each quarter, setting forth its receipts and disbursements (Art. 13, Sec. 5, p. 24); to hold in trust for the Aerie all shares of stock, bonds, promissory notes, mortgages, and other securities belonging to the lodge (Art 13, Sec. 6, p. 24); at the end of each semi-annual period to file a detailed report with the lodge and the grand secretary, setting forth the financial position of the Aerie (Art. 13 Sec. 7, p. 24); before the tenth of each month to report to the grand secretary all Aerie funds received and paid out (Art. 13, Sec. 9, p. 25); and to visit weekly each sick member of the lodge (Art. 13, Sec. 10, p. 25). The treasurer

of the Aberdeen Aerie received compensation of $5 per month. (R. 148.) The treasurer of the Ballard Aerie received compensation of $1 per month. (R. 213.)

The Aerie trustees are fraternal officers (Art. 1, Sec. 1, p. 3) elected for terms of 3 years (Art 2, Sec. 7, p. 5). They are required to hold in trust for the benefit of the lodge all its real property and all personal property not entrusted to the treasurer (Art. 14, Sec. 1, p. 26, Art. 14, Sec. 10, p. 28). Meetings of the Board of Trustees must be held at least weekly (Art. 14, Sec. 1, p. 26). They are required to keep all official records (Art. 14, Sec. 1, p. 26) including books setting forth their financial transactions on behalf of the Aerie (Art. 14, Sec. 7, p. 27). Weekly, quarterly, and semi-annual reports to the lodge must be made of their activities (Art. 14, Secs. 5, 7, 8, p. 27). These activities include maintenance and operation of the Aerie home, employment, discharge and control of all employees, and approval of all bills before submission to the lodge for final action (Art. 14, Sec. 2, p. 26). The trustees are required to invest all excess funds of the Aerie in such securities as are approved by the lodge members (Art. 14, Sec. 6, p. 27). They also have the duty of enforcing all rules relative to the conduct of members in the club rooms (Art. 14, Sec.

3, p. 27). The trustees may be removed at any time for cause (Art. 14, Secs. 11-13, pp. 28-29). They received compensation in this case at the rate of $1 per quarter. (R. 146.)

It is the Government's position that the foregoing administrative services of taxpayers' president, vice president, treasurer, and trustees are in no way connected with any strictly ritualistic duties which they may, in addition, perform. Since there is no showing of the extent of the strictly ritualistic activities of these officers, it is impossible to determine that the administrative services are subordinate to the strictly ritualistic activities. In the case of each of these officers, compensation is paid. There is no showing that this compensation is not paid for the administrative services of these officers. It is submitted that the services performed by taxpayers' president, vice president, treasurer, and trustees are not exclusively ritualistic services as defined in Mim. 4880, *supra*, and, consequently, that these officers must be treated as employees for purposes of the Social Security Act.[3]

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[3] In *American Legion v. Reynolds* (Minn.) decided August 12, 1943 (P. H. Unemployment Insurance Service, Vol. 1, par. 36, 275), it was held that the vice commander, chaplain, historian, treasurer and judge advocate, unpaid officers of the taxpayer, were in its employment under Title IX of the Social Security Act

The musician involved in the Ballard Aerie case is a member of the lodge who plays the piano at initiations and at the opening and closing of each weekly meeting. For this he received from $2 to $2.50 per meeting. (R. 201-202.)

The complaint in the Ballard Aerie case contains the assertion that this musician was an independent contractor and hence not to be treated as an employee for purposes of this tax (R. 5, 9, 13, 17.) Nevertheless, the record is devoid of any evidence that this musician was not subject to the same degree of control as an ordinary employee. The fact that he played a few selections on the piano at the opening and closing of each weekly meeting, and at initiations does not warrant the conclusion that he was an independent contractor.

The District Court held that services performed by this musician constituted casual labor and for this reason were excluded from the term employment "under the provisions of Title VIII, Sec. 811 (b) (3) Social Security Act, 1935". (R. 82.) The status of the musician is involved only for 1936 through 1939

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on the sole ground that they were officers and as such employees *per se* by virtue of Section 1101 (a) (6) of Title IX of the Social Security Act. The case of *Nicholas v. Richlow Mfg. Co.*, 126 F. (2d) 16 (C.C.A. 10th), was cited as authority for this conclusion.

and only in the Ballard Aerie case. This case concerns only Title IX of the Social Security Act and Chapter 9C of the Internal Revenue Code. Prior to 1940, this law contained no provision excluding casual labor from the definition of employment. Such a provision, Section 1607 (c) (3) of the Internal Revenue Code, was first added to the law by Section 614 of the Social Security Act Amendments of 1939, effective January 1, 1940. This amendment does not have retroactive effect. *Chester C. Fosgate Co. v. United States*, *supra*.. Hence, it is clear that the ground chosen by the District Court for exempting services performed by this musician was erroneous.

No musician is referred to in the constitution of this fraternal order. It is apparent that he is not an officer of the lodge. For this reason the musician does not come within the scope of Mim. 4880, 1939-1 Cum. Bull. 312, and the services which he performs are not strictly ritualistic services. Consequently, the musician must be treated as being in the employment of taxpayer for purposes of Title IX of the Social Security Act and Chapter 9-C of the Internal Revenue Code.

V

THE AERIE PHYSICIANS ARE WITHIN THE TERM "EMPLOYMENT" SINCE THEY PERFORM SERVICES AS EMPLOYEES FOR TAXPAYERS

During the entire period involved, services were performed for the Aberdeen Aerie and its members by one physician. (R. 88-90.) During 1936, 1938, and 1939, services were performed for the Ballard Aerie and its members by two physicians, and during 1937 by three physicians. (R. 104-106.) To determine the facts relative to this service, reference is again made to the "Constitution for Subordinate Aeries, Fraternal Order of Eagles," *supra.*

The physician holds an office of the lodge (Art. 1, Sec. 1, p. 3), and is elected annually as are the other officers (Art. 2, Sec. 2, p. 4). In the event an Aerie has more than 600 members, an additional physician may be elected for each multiple of 600 or major fraction thereof (Art. 1, Sec. 2, p. 3.) Where it is for the best interests of the Aerie to dispense with the election of a physician as an officer, on approval of the chief auditor, the lodge may do so and enter into a contract for his services. (Art. 15, Sec. 18, pp. 34-35.) However, the physicians here involved were elected officers of the lodge. (R. 120, 202.)

Compensation at the rate of 50 cents per quarter for each member in good standing is paid at the end of each quarter to the physician. (Art. 15, Sec. 13, p. 32.) In the event of more than one physician, this compensation is divided equally, or, with the approval of the chief auditor, divided on a basis of the respective services performed. (Art. 15, Sec. 14, pp. 32-33.) Where it is for the best interest of the lodge and with the dispensation of the chief auditor, the compensation paid to a physician may be at a different rate from that called for in the constitution. (Art. 15, Sec. 15, p. 33.)

With no charge, other than his quarterly compensation from the Aerie the physician is required "to attend, prescribe for and perform such minor surgical work as may be necessary" for all members in good standing and their families. (Art. 15, Sec. 1, p. 29, Sec. 3, p. 30.) Provision is made for similar service for widows of deceased members and their families by the payment of a medical fee to the lodge. (Art. 15, Sec. 6, p. 30.) It is specifically provided that, except in the case of widows, medical service shall be extended only to members in good standing and their families. (Art. 15, Sec. 4, p. 30.) The "minor surgical work" which the physician is required to perform is defined with considerable particularity. (Art. 15, Sec.

17 (d), p. 34.) Treatment required of the physician does not include cases of confinement, social diseases, sickness or injury caused by the use of intoxicating liquors or opiates, or immoral conduct, and does not include any chronic disease or disability which existed when the individual became a member of the Lodge. (Art. 15, Sec. 5, p. 30.) Before treating any members or his family, the physician is required to demand for inspection the member's official receipt showing that he is a member in good standing. (Art 15, Sec. 4, p. 301.) The physician must attend all weekly meetings of the lodge and report the condition of each sick member under his care. At such weekly meetings he must also file with the secretary a report of each sick member under his care on forms prescribed by the board of grand trustees. (Art. 15, Sec. 7, p. 31.) The physician is required to maintain regular office hours, regular telephone service, and to advise the secretary accordingly. In the event he is absent from his office during such hours he is required to have a competent person present to handle all communications. (Art. 15, Sec. 8, p. 31.) In the event a member has been treated by a doctor, other than the Aerie physician, before sick benefits can be paid to that member the certificate of the attending doctor must be approved by the Aerie physician. (Art. 13,

Sec. 11, p. 32.) The committee on grievances, appointed by the president, has the duty to "supervise all acts and duties of every Aerie physician elected by the Aerie". (Art. 24, Sec. 2, p. 42.)

If the Aerie physician fails to attend any ailing member as required by the constitution, the president is empowered to obtain the services of another doctor for this purpose and to deduct the fees of such other doctor from the compensation due the Aerie physician. If the neglect is found to be wilful, the Aerie physician is removed from office. (Art. 15, Sec. 10, pp. 31-32.) Provision is made for removing the physician from office for cause by complaint filed with and hearing before the grievance committee. (Art. 24, p. 22.) In addition, the services of the physician may be dispensed with entirely if the general fund of the lodge does not warrant (Art. 1, Sec. 2, p. 3), or, if the maximum sick benefits provided by the constitution are not paid, or if funeral benefits of less than $100 are paid (Art. 16, Sec. 3, p. 35), or whenever it is for the best interests of the lodge (Art. 15, Sec. 18, pp. 34-35).

It appears from the testimony in these cases that in practice the physicians here involved do not adhere strictly to certain of the foregoing requirements of the fraternal constitution, for instance, attendance at all

weekly meetings. (R. 127, 129-130.) However, the taxpayers have the power to require strict compliance by the physicians with the duties of their fraternal office.

The expenses of procuring and maintaining the physical office and equipment of the physician are paid by him, in part out of the quarterly compensation which he receives from taxpayers. No direct payment is made by taxpayers for these specific purposes. (R. 121-123.) The services rendered for the lodge members by the physician are performed either in his office, their homes, or in a hospital. (R. 124.)

It was held by the District Court that the physicians here involved were not in the employment of taxpayers on two grounds: (1) They were ritualistic officers of the taxpayers, and (2) the services which they performed for taxpayers were rendered by them as independent contractors. (R. 82.)

From the previous discussion of what constitutes exclusively ritualistic services under Mim. 4880, 1939-1 Cum. Bull. 312, it is considered apparent that the services rendered by these physicians were not exclusively ritualistic services. There is no showing that they had any activities which were strictly ritualistic. Certainly the administrative duties which they performed had no relation to any ritualistic matters.

In addition, the physicians received substantial compensation for the services which they rendered on behalf of the taxpayers.

Section 1101(a) (6) of Title XI of the Social Security Act, applicable to both Titles VIII and IX of that Act (Appendix, *infra*), and Sections 1426(d) and 1607(i) of the Internal Revenue Code provide: "The term 'employee' includes an officer of a corporation." Article 3 of Treasury Regulations 91, promulgated under Title VIII of the Social Security Act; Section 402.204 of Treasury Regulations 106, promulgated under Chapter 9A of the Internal Revenue Code; Article 205 of Treasury Regulations 90, promulgated under Title IX of the Social Security Act, and Section 403.204 of Treasury Regulations 107, promulgated under Chapter 9C of the Internal Revenue Code, provide: "An officer of a corporation is an employee of the corporation, * * *."

The taxpayer involved in *Nicholas v. Richlow Mfg. Co.*, 126 F. (2d) 16 (C.C.A. 10th), concededly had seven employees within the meaning of Title IX of the Social Security Act. The question presented was whether the taxpayer's corporate secretary was likewise an employee so as to render taxpayer liable for taxes under that Act. During the years involved the

secretary (p. 17) — "performed the duties of that office in accordance with § 15 of the taxpayer's by-laws." The extent of the services actually performed by the secretary is not shown. She received no compensation for these services. The court held that this individual was an employee of taxpayer since she held the office of corporate secretary and, under Section 1101 (a) (6) of Title XI of the Social Security Act, corporate officers are employees *per se*.[4]

In discussing the purpose of Section 1101 (a) (6), the court in the *Richlow* case, *supra*, noted that under certain state laws, such as workmen's compensation laws, much litigation had arisen as to whether a corporate officer was capable of being an employee under the usually accepted tests of employer-employee relationship; that it was to obviate this troublesome question that Section 1101 (a) (6) was enacted; that to accomplish this purpose Section 1101 (a) (6) must be construed as rendering all corporate officers employees without regard for the details of their relationship with the corporation.

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[4] To the same affect see: *American Legion v. Reynolds* (Minn.), decided August 12, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,275); *Builders Lumber & Supply Co. v. United States*, 48 F. Supp. 241 (W.D. Wis.); *Beaverdale Memorial Park v. United States*, 47 F. Supp. 663 (Conn.).

If the construction of the statute announced in the *Richlow* case be accepted, it is plain that the individuals here involved must be regarded as employees. They hold a corporate[5] office which is provided for by the fraternal constitution and the taxpayers' by-laws. They were elected to this office by vote of taxpayers' members as were the other officers of the taxpayers.

Two days after the decision in the *Richlow* case, the Circuit Court of Appeals for the First Circuit rendered its decision in *Deecy Products Co. v. Welch*, 124 F. (2d) 592. The taxpayer in that case had seven individuals who were concededly employees for purposes of Title IX of the Social Security Act. The question presented was whether the statutory clerk of the taxpayer corporation was likewise an employee so as to render it liable for taxes under that Act. During the year involved the clerk in question actually

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[5] Section 1101 (a) (4) of Title XI of the Social Security Act, applicable to both Title VIII and IX of that Act, and Section 3797 (a) (3) of the Internal Revenue Code, applicable to Chapter 9A and C of the Internal Revenue Code, provide that the term "corporation" includes associations. No question has been raised in these cases of any distinction between the corporate structure of these fraternal associations and any other corporation organized under the laws of the State of Washington.

performed services which required only 35 minutes of his time. However, taxpayer's by-laws set forth in some detail the duties of its corporate clerk with the provision that he (p. 593) "shall perform such other duties as the directors shall from time to time prescribe." The clerk received no compensation for his services.

While the *Richlow* case was not mentioned, the court in the *Deecy Products* case, *supra*, implicitly differed with the Circuit Court of Appeals for the Tenth Circuit in the purport of Section 1101(a) (6) of Title XI of the Social Security Act. It was the court's opinion that while the enactment of this section was to put at rest a troublesome question which had arisen under certain state laws, the question so obviated was not whether a corporate officer was capable of being an employee, but rather whether a corporate officer who was also an employee under the accepted tests of employer-employee relationship came within the general scope of the particular law. Accepting this as the purpose of Section 1101 (a) (6), the court held that a corporate officer was an employee only if the pertinent facts satisfied the accepted tests of such status; that, having been determined to be an employee, such

corporate officer was within the general scope of the Social Security Act.[6]

Despite the fact that the corporate clerk in the *Deecy Products* case received no compensation and performed services extending over only 35 minutes, the court emphasized the potential control which the corporate directors had over the clerk and their power under the by-laws to direct him to perform such unenumerated services as they might prescribe. It was concluded that these factors were sufficient to render the corporate clerk an employee of taxpayer. Regardless of what appears to be a conflict between the two courts concerning the effect of Section 1101(a) (6), it will be noted that the test of employer-employee relationship applied by the court in the *Deecy Products* case would likewise render the corporate secretary involved in the *Richlow* case an employee.

Simultaneously with the *Deecy Products* case the

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[6] To the same effect see: *First State Bk. & Tr. Co. v. United States* (S.D. Tex.), decided July 2, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,267; *Jackson County State Bank v. United States* (S.D. Tex.), decided April 16, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,265; *Dorfman's Jewelry Store v. United States* (S.D. Tex.), decided February 13, 1943, not reported; *San Antonio Trunk Co. v. United States* (W.D. Tex.), decided July 1, 1941 (P-H Unemployment Insurance Service, Vol. 1, par. 36,163).

Circuit Court of Appeals for the First Circuit handed down its decision in *United States v. Griswold*, 124 F. (2d) 599. The taxpayer involved in that case was a Massachusetts business trust, treated for purposes of the opinion as a corporation. The taxpayer concededly had more than eight employees under Title IX of the Social Security Act so as to be subject to the tax imposed by that Act. However, the question was whether its five trustees were employees so as to result in their salaries being includable in the tax base. These trustees performed extensive services for the taxpayer and received substantial compensation. The trust instrument provided (p. 600) that the trustees "in all instances shall act as principals, and are and shall be free from the control of the shareholders." The choice of trust investments was in the uncontrolled discretion of the trustees. Within certain limits, they had the power to fix their own compensation. They held their office for life except that any one trustee could be removed on order of all the remaining trustees. These trustees were accountable to nobody comparable to a corporate board of directors. Applying the same reasoning that it applied in the *Deecy Products* case, *supra*, the court held that these trustees were not employees for purposes of Title IX of the Social Security Act. This conclusion was based on the fact that the trustees were

almost untrammeled in their activities, being subject to no control by a board of directors and practically no direct control by the shareholders. The control of a superior authority which was found to be lacking in the *Griswold* case is clearly present in the cases at bar. Accordingly, the *Griswold* case is not an authority opposed to the Government's position here.

The most recent case on this subject is *Independent Petroleum Corp.* v. *Fly*, 141 F. 2d 189 (C.C.A. 5th) That case involved the question of whether taxpayer's corporate secretary was an employee under Title IX of the Social Security Act so as to make it an employer of eight or more individuals and thereby subject to the tax imposed by that Act. During the year involved the only actual service performed by this corporate secretary was affixing her signature to two tax returns and the minutes of an annual stockholders' meeting, none of which documents did she prepare herself. The court placed the same construction on Section 1101 (a) (6) of Title XI of the Social Security Act as did the Circuit Court of Appeals for the First Circuit in the *Deecy Products* and *Griswold* cases, *supra*, to the effect that a corporate officer was an employee only if the pertinent facts satisfied the accepted tests of employer-employee relationship. However, to determine the existence of this relationship, the court in

effect differed with the Circuit Court of Appeals for the First Circuit in the test to be applied. It held (p. 191) that only an officer who works "in fact", who "actually works", and who is "really employed" constitutes an employee. Applying this test to the facts in the *Independent Petroleum* case, *supra*, the court concluded that the corporate secretary involved was not an employee for purposes of Title IX of the Social Security Act.

If the construction placed upon Section 1101 (a) (6) in the *Richlow* case be accepted, then the physicians here involved, being duly elected officers of the taxpayers, are their employees *per se*. However, if this construction of the statute is not accepted and the Aerie physicians are not employees *per se*, they are, nevertheless employees under the tests of employer-employee relationship applied in the *Deecy Products* and *Griswold* cases, *supra*, and in the *Independent Petroleum* case, *supra*.

The details of control by taxpayers over the Aerie physicians are set forth in the fraternal constitution. The physicians are required to perform a generally defined type of service for taxpayers. Before this service may be rendered they must ascertain whether the patient is a member in good standing of the lodge. The physicians must attend all weekly meetings of the

lodge and at each meeting make both oral and written reports of the condition of ailing members treated by them. They must maintain regular office hours and telephone service and make provision for secretarial assistance to be responsible for all communications. Where a member has been treated by a doctor other than an Aerie physician, before that member may obtain sick benefits the Aerie physician must approve the certificate of the attending doctor. General control over the physicians is delegated to the committee on grievances whose duty it is to "supervise all acts and duties of every Aerie physician elected by the Aerie."

These and other items of supervision by taxpayers over the physicians result in a degree of control comparable to, if not exceeding, that considered in the *Deecy Products* case, *supra*, sufficient to create an employer-employee relationship. Certainly the degree of control here exceeds that exercised by the shareholders over the trustees in the *Griswold* case, *supra*.[7]

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[7] It is to be noted that the question of control by taxpayers over the Aerie physicians in these cases becomes academic if the reasoning of the *Richlow* case is accepted.

If the reasoning of the *Deecy Products* and *Griswold* cases is accepted, the existence of the requisite control to result in an employer-employee relationship must be determined on the facts of the particular case.

In S.S.T. 291, 1938-1 Cum. Bull. 416, it was held

In the *Independent Petroleum* case, *supra*, emphasis was placed on the requirement that the corporate officer "actually works" in order to make him an employee. There can be no question concerning the actuality of the services performed for taxpayers by the physicians in these cases. That these services were substantial and valuable is indicated by the rate of compensation paid by taxpayers to the physicians.

It is the Government's position that under the tests of an employer-employee relationship applied in the *Deecy Products* and *Griswold* cases, *supra*, and in

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that a physician who, pursuant to an oral agreement with a manufacturing company, visited the company's plant for at least two hours each morning and there tended the employees and examined the prospective employees of the company, and received for this service a fixed amount per month, was an employee of the company for purposes of Titles XIII and IX of the Social Security Act.

In C.T. 18, 1939-2 Cum. Bull. 295, it was held that local physicians who treated the sick and injured employees and injured passengers of a railway company pursuant to an oral agreement with the company whereby they were paid a fixed monthly retainer by the company, were not employees of the company under Chapter 9B of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937). To the same effect, see S.S.T. 240, 1937-2 Cum. Bull, 403, involving a physician; C.T. 15, 1939-1 Cum. Bull. 318, involving an attorney; and S.S.T. 86, 1937-1 Cum. Bull. 462, also involving an attorney.

the *Independent Petroleum* case, *supra*, the physicians here involved were employees of taxpayers for purposes of the Social Security Act.

CONCLUSION

For the reasons stated herein it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII — TAXES WITH RESPECT TO EMPLOYMENT

SECTION 801. * * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 811) received by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (42 U.S.C. 1940 ed., Sec. 1001.)

SEC. 804. * * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 811) paid by him after December 31, 1936, with respect to employment (as defined in Section 811) after such date: * * *. (42 U.S.C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, * * *.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * *

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, for the prevention of cruelty to children or animals, no part of the net earnings of which

inures to the benefit of any private shareholder or individual. (42 U.S.C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMLOYERS OF EIGHT OR MORE

SECTION 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year:

* * *

(42 U.S.C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, * * *.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * *

(7) Service performed in the employ of a corporation, community chest, fund, or foundation,

organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. (42 U.S.C. 1940 ed., Sec. 1107.)

TITLE XI — GENERAL PROVISIONS

SECTION 1101. (a) When used in this Act—

* * *

(6) The term "employee" includes an officer of a corporation.

* * *

(42 U.S.C. 1940 ed., Sec. 1301.)

The foregoing provisions became, without change, Section 1400, 1410, 1426 (a) (b) and (8) and (d), 1600, and 1607 (a), (b), and (c) (8) of the Internal Revenue Code.

Internal Revenue Code:

SEC. 1400 [as amended by the Social Security Act Amendments of 1939, c. 666, 53 stat. 1360, Sec. 601]. RATE OF TAX.

* * *, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in Section 1426 (a)) received by him after December 31, 1936, with respect to employment as defined in Section 1426 (b)) after such date:
* * *

(26 U.S.C. 1940 ed., Sec. 1400.)

SEC. 1410 [as amended by the Social Security Act Amendments of 1939, Sec. 604]. RATE OF TAX.

* * *, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in Section 1426 (b)) after such date: * * *

(26 U.S.C. 1940 ed., Sec. 1410.)

SEC. 1426 [as amended by the Social Security Act Amendments of 1939, Sec. 606]. DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term 'wages' means all remuneration for employment, * * *

* * *

(b) *Employment.* — The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *, except—

* * *

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the acti-

vities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under Section 101, if—

(i) the remuneration for such service does not exceed $45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, * * *.

(26 U.S.C. 1940 ed., Sec. 1426.)

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in Section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

* * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be

accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

An officer of a corporation is an employee of the corporation, * * *.

Treasury Regulations 91, promulgated under Title VIII of the Social Security Act:

ART. 3. *Who are employees.*—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an em-

ployment as defined in Section 811 (b). (see article 2)

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in

which they offer their services to the public, are independent contractors and not employees.

* * *

An officer of a corporation is an employee of the corporation, * * *.

The foregoing provisions are the same as those contained in Section 402. 204 of Treasury Regulations 106, under the Federal Insurance Contributions Act (Sections 1600 *et seq.* of the Internal Revenue Code.)

APPENDIX B

Aberdeen Aerie v. United States of America

OFFICER	CLAIM FOR REFUND	COMPLAINT	PROPERLY IN ISSUE
	1938		
Physician	x(1)	x(2)	x(1)
President	x*	x	x
Vice President	x*	x	x
Treasurer	x*	x	x
Conductor	x		
Musician		x	
Trustees	x	x	x
	1939		
Physician	x(1)	x(2)	x(1)
President	x*	x	x
Vice President		x	
Treasurer	x*	x	x
Conductor	x		
Musician		x	
Trustees	x	x	x
	1940		
Physician	x(1)	x(2)	x(1)
President		x	
Vice President		x	
Treasurer		x	
Conductor			
Musician		x	
Trustees		x	
	JAN. 1, 1941 THROUGH SEPT. 30, 1941		
Physician	x(1)	x(2)	x(1)
President		x	
Vice President		x	
Treasurer		x	
Conductor			
Musician		x	
Trustees		x	

*Conceded to be included in claim for refund though there referred to by proper name of office-holder only.